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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

No. 926

CARL ALTON WRIGHT AND
WILLIAM JOHNSON YAUGHN

Petitioners

V.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

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For The Fifth Circuit

Petitioners, Carl Alton Wright and William Johnson Yaughn, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 30th of October, 1968.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported to date, but is reproduced in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on the 30th of October, 1968. Petitioners filed a petition for rehearing on the 12th of November 1968. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTION PRESENTED

Was petitioner Yaughn "arrested" when he was stopped and detained of his liberty by an Air Force policeman on a paved road within the boundary of a military reservation (where he was then employed) at approximately 4:00 A.M. and some 400 yards from the scene of a theft by two men of government property which had occurred previously at about 3:05 A.M., or did his "arrest" occur some three and one-half hours later after he had been turned over to and questioned by FBI agents? If he were "arrested" by the air policeman, was there probable cause of mere suspicion? Such is crucial inasmuch as the eventual search of his person at approximately 7:25 A.M. resulted in the taking therefrom of his shoes and some lock picking devices which would have a tendency to connect him with the theft.

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

The Fourth Amendment to the Constitution of the United States, Rule 41 (e), Federal Rules of Criminal Procedure and 18 USCA 641.

STATEMENT OF THE CASE

Petitioners were convicted in the United States District Court, Middle District of Georgia, of the theft of 30,000 rounds of Government ammunition from a military reservation in violation of 18 USC 641.

FBI agents had reports of a possible theft (but not as to the names of suspects) and were observing the ammunition building when at about 3:00 A.M., two men, one dressed as a civilian air policeman (Wright was a civilian policeman at the base) and one wearing "dark colored clothing" came up in an air police truck, went to the front door, one went in and the uniformed man got back in the truck and drove to the rear door. Later the truck left, was followed and shortly Wright

was found seated in it, in a nearby storage area with some of the ammunition on the ground and some in the truck. No other person was there or seen. About one and one-half hours later, Yaughn was stopped as he was walking down a paved road by a regular Air Force Military Policeman. He showed his identity badge to the airman and said he was going over to another building in the area to check on some x-ray equipment. The military policeman called his headquarters and the FBI arrived shortly and Yaughn was turned over to them. The military policeman, at the time he stopped Yaughn, had no orders other than being told "to search the area for anybody actually that was in the area at 4:00 in the morning". However, he did know of the theft and that a second party had been involved, but that was all.

Thereafter, Yaughn was questioned by the FBI, but denied this implication. The United States Attorney was telephoned about 7:00 A.M. or 7:20 A.M. and authorized a complaint and thereupon Yaughn was searched and in his wallet lockpicking tools were found. His shoes were also removed and the soles thereon were similar to prints found in the ammunition building.

Both Wright and Yaughn moved to suppress as evidence various items of clothing taken from them, including shoes, and Yaughn, in addition, moved to suppress the lockpicking devices as well, and also moved for a severance. All motions were denied, the case proceeded to trial; they were convicted and appeals followed.

REASON FOR GRANTING THE WRIT

As to Yaughn, if the military policeman had only suspicion and not probable cause, the initial detention of Yaughn was in fact an arrest and was therefore not authorized. Hence, the subsequent search of Yaughn which revealed the incriminating evidence was illegal and its introduction into evidence prejudi-

cially harmful and erroneous. It is unquestioned that the search cannot relate back so as to authorize an otherwise illegal arrest.

The Court of Appeals below in its opinion fails to determine the time of Yaughn's arrest, merely saying that there was abundant evidence supporting probable cause to make such arrest. We submit he was "arrested" at the moment he was first detained by the military policeman. It is clear that as Yaughn was first observed by the military policeman, there were no visible fruits of the crime, no visible evidence of burglary tools, no evidence of the military policeman having been furnished the name or accurate description of the second party involved. In short, nothing except presence some 400 yards from the theft scene and the fact a theft had been committed by two people with one still at large.

We say the Fifth Circuit has decided this case adversely to the holding in *Gatlin v. United States*, C. A. D. C. 1963, 326 F2d 666, wherein an arrest was illegal when it occurred on a street a mile and one-half from a robbery when the one who escaped was a Negro wearing a trench coat who fled in a taxi. Gatlin was a Negro and was wearing a trench coat at the time, but his arrest was held to be for investigation and not based on probable cause. We fail to see how Yaughn's arrest could have been for anything other than for investigation. He was properly on the military reservation inasmuch as he was an employee on the shift for that hour of the morning, although his regularly assigned building was on the other end of the base some three to five miles. However, he was not restricted to that building alone.

The lower appellate court has therefore failed to properly apply this Court's holding in *Henry v. United States*, 1959, 361 U. S. 98, 80 S. Ct. 168, 4 L Ed 2nd 134. The factual detention of Yaughn constituted his arrest and at the time there was no probable cause therefor and the evidence seized from him should have been suppressed.

CONCLUSION

Each petitioner is hereby applying for the writ of certiorari although there is a distinction as to the legal points involved. It is submitted that the evidence as to Wright, of necessity, had its impact on Yaughn and when evidence of the lockpicking devices and similarity of footprints were introduced as to Yaughn, such was crucial. This Court could therefore grant certiorari only as to Yaughn.

The effect of the ruling below under the evidence is an unwarranted extension of the rule permitting arrests without a warrant.

For the foregoing reasons, the petition should be granted in order to determine the legality of the admissibility of the evidence so obtained and its effect upon the joint trial of petitioners.

Respectfully submitted,

Joseph H. Davis

914 Persons Building
Macon, Georgia 31201

CERTIFICATE OF SERVICE

I, Joseph H. Davis, do certify that I have on the date shown below served the within petition upon the United States Attorney, Middle District of Georgia, Macon Division, Macon, Georgia, Counsel of Record for adverse party, by mailing same to him at his post office address, United States Courthouse, Macon, Georgia, and also by mail upon the Solicitor General, Department of Justice, Washington, D. C. 20530, with first class postage prepaid in each instance.

This 6 + 1 day of January, 1969.

Joseph H. Davis,
Council of Record
for Petitioners

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25442

CARL ALTON WRIGHT AND
WILLIAM JOHNSON YAUGHN

Appellants,

versus

UNITED STATES OF AMERICA

Appellee,

Appeal from the United States District Court for the Middle District of Georgia

---

(October 30, 1968)

Before WISDOM and AINSWORTH, Circuit Judges, and JOHNSON, District Judge.

PER CURIAM: Appellants Wright and Yaughn were convicted after trial by a jury for violating 18 U.S.C. § 641 in the theft of ammunition of a value exceeding $100, belonging to the United States, from the ammunition storage building at Robins Air Force Base, Macon, Georgia. Wright was sentenced to a term of three years and Yaughn to a term of two years. Each defendant has appealed.

Appellant Yaughn assigns as error the failure of the District Court to grant his motion for a severance. We find no error,

however, in the ruling complained of, this being a matter within the sound discretion of the District Court, there being no evidence of a confession or admission by Yaughn's co-defendant incriminating him, and no prejudice having been shown by this appellant. Rule 14, Fed. R. Crim. P.; *Peterson v. United States*, 5 Cir., 1965, 344 F. 2d 419; *Garcia v. United States*, 5 Cir., 1963, 315 F. 2d 679, 680.

Both appellants complain of the denial by the District Court of their motions to suppress certain evidence. As to appellant Wright, this evidence consisted of a pair of boots, and as to appellant Yaughn, the evidence consisted of a sweat shirt and trousers, a pair of black shoes and a number of metallic objects taken from his wallet, which objects were lock-picking tools.

Appellants were apprehended within the confines of Robins Air Force Base, Wright having been found in a truck which contained the stolen boxes of ammunition. Yaughn was apprehended at about 4 a.m. in the vicinity of the place where the offense was committed, wearing a red sweater. Agents of the FBI having received information from a reliable informer observed the theft with the use of binoculars. One of the men observed wore a dark red sweater. Prints were found within the ammunition storage building which matched Wright's boot and Yaughn's shoes.

We find no error in the denial of the motions to suppress. The searches and seizures of personal apparel and lock-picking devices referred to were made pursuant to lawful arrest. *Henry v. United States*, 361 U. S. 98, 80 S. Ct. 168 (1959); *Harris v. United States*, 331 U. S. 145, 67 S. Ct. 1098 (1947); *United States v. Rabinowitz*, 339 U. S. 56, 70 S. Ct. 430 (1950); *Draper v. United States*, 358 U. S. 307, 79 S. Ct. 329 (1959); *Wooten v. United States*, 5 Cir., 1967, 380 F. 2d 230; *Jackson v. United States*, 5 Cir., 1963, 319 F. 2d 782.

There was abundant evidence supporting probable cause to

make such an arrest. Appellant Wright was found in possession of the stolen ammunition and appellant Yaughn was apprehended nearby in the early hours of a very cold morning wearing a red sweater, in a restricted military area which was being searched at the time by police officers for the second accomplice. See *Miller v. United States*, 5 Cir., 1966, 356 F. 2d 63, 66; *Beck v. State of Ohio*, 379 U. S. 89, 85 S. Ct. 223 (1964); *Jackson v. United States*, 5 Cir., 1963, 319 F. 2d 782; *United States v. McMann*, 2 Cir., 1967, 370 F. 2d 757.

We are convinced that both appellants were fairly tried and convicted by the jury and that no error was committed by the District Court in denying their motions for severance and to suppress.

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM 1968

No. 25442

D. C. Docket No. Cr. 8542

CARL ALTON WRIGHT AND
WILLIAM JOHNSON YAUGHN,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee,

Appeal from the United States District Court for the Middle District of Georgia

Before WISDOM and AINSWORTH, Circuit Judges, and JOHNSON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 30, 1968

Issued as Mandate:

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25442

CARL ALTON WRIGHT AND
WILLIAM JOHNSON YAUGHN,

Appellants,

versus

UNITED STATES OF AMERICA

Appellee,

Appeals from the United States District Court for the Middle District of Georgia

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(Nov. 29, 1968)

ON MOTION FOR REHEARING

Before WISDOM and AINSWORTH, Circuit Judges, and JOHNSON, District Judge.

PER CURIAM:

IT IS ORDERED that appellants' Motion for Rehearing in this cause is hereby DENIED.

CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

U. S. Constitution, Amendment IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41 (e), Federal Rules of Criminal Procedure.

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

18 U. S. C .A. 641.

Whoever—steals—thing of value of the United States—

Shall be fined not more than $10,000.00 or imprisoned not more than ten years or both—

CITATIONS

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C.A.D.C. 1963, 326 F2d 666 4

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 926

CARL ALTON WRIGHT AND WILLIAM JOHNSON YAUGHN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 403 F. 2d 43.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1968. A petition for rehearing was denied on November 29, 1968. Mr. Justice Fortas extended the time for filing a petition for a writ of certiorari to January 8, 1969, and the petition was

filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether probable cause existed for the arrest of petitioner Yaughn without a warrant.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioners were convicted of theft from a military reservation of ammunition valued at more than $100, in violation of 18 U.S.C. 641. Wright was sentenced to imprisonment for three years and Yaughn to imprisonment for two years (R. 1, 301-302). The court of appeals affirmed.

The sole issue is the validity of Yaughn's arrest and a search incident thereto.

The evidence at a hearing on a motion to suppress and at trial showed that a number of thefts at Robins Air Force Base, Georgia, had occasioned an F.B.I. investigation and surveillance of Building 619, in which ammunition was stored. On the morning of Sunday, February 5, 1967, at approximately 3:15 A.M., agents stationed at different points observed an Air Force police truck stop in front of the building (R. 24-26, 70-71, 80, 95, 131). Two men got out and went to the front door of the building. One was dressed in the uniform of a civilian policeman for the Air Force. The other, of medium height and hatless, was described by some of the agents as dressed in dark clothing (R. 27, 96), and by others

as wearing a dark red or rust colored sweater and lighter colored trousers (R. 72, 74, 76-77, 134, 137). After a short period during which the men were doing something at the door the nature of which the agents were unable to discern, the door was opened. The man in civilian clothes entered, and another door was opened. The truck was driven up to the second door and both men were seen carrying boxes from the building and loading them on the truck. After about ten minutes, the truck drove off quickly, eluding an attempt by agents in a government vehicle to pursue it. About five minutes later, at a distance of some 400 yards from Building 619, an Air Force truck with Wright seated in it was found in a storage area. Cartons of ammunition were in the truck and next to it on the ground.[1] Wright was placed under arrest (R. 28, 37, 51, 54, 96-97, 126, 150-151).

At about 4:00 A.M., two military police from the Air Force were scouting the area looking for the second man. At a point on the base about three blocks from the site of the theft they saw petitioner Yaughn, hatless, walking at the side of the street. He was asked to produce his ID card and to state where he worked. Yaughn said that he worked at a building on the opposite side of the base and that he was going

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[1] On the previous Friday an inventory of the ammunition in Building 619 had been made and F.B.I. agents had placed identifying marks on some of the boxes. All of the boxes at the scene of Wright's arrest bore these markings and their number corresponded exactly with the shortage found upon re-inventorying the stock after the theft. A total of approximately 37,000 rounds of ammunition, valued at $1,200 to $1,300, was involved (R. 38, 78, 92, 100-103, 207-212, 216).

for some x-rays. He was asked to stand by while a radio call to security headquarters was placed (R. 9-20). A few minutes later, two F.B.I. agents arrived. Yaughn matched the description which the agents had received of an individual of medium height wearing a rust colored sweater or jacket which zipped up the front, and light colored trousers (R. 61-65). Yaughn was asked to accompany the agents to security headquarters and was searched for weapons (R. 197). At headquarters he was advised of his rights and signed a waiver. In response to questioning, Yaughn said that he was on the way to the propeller shop where he was going to examine some X-ray equipment in conjunction with his work. He said that he walked the distance of approximately five miles from the place where he worked because he had suffered from an ulcer and long walks aided his health (R. 197-198). Examination of Yaughn's billfold revealed a number of lock picking devices (R. 44, 49, 181-182).[2] He was formally placed under arrest about 7:30 A.M., following a call to the United States Attorney (R. 20).

ARGUMENT

There was ample probable cause for Yaughn's arrest, regardless of the point of time at which such arrest is considered to have taken place. If, as petitioners argue, the moment of arrest was the point of time when the two military police detained Yaughn,

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[2] Heel marks of the shoes of both petitioners corresponded in minute detail with markings in the dust at Building 619 (R. 42, 105-112, 127-129, 263-267).

reasonable grounds for believing him to be the individual sought then existed. He was found at 4:00 A.M. in an area of the base which was only three blocks from the scene of the theft, and five miles from the place where he was employed. While petitioners lay great stress on the fact that a detailed description of the individual had not been communicated to these two particular officers, the validity of an arrest is evaluated upon the collective information of all participating officers. *United States* v. *Ventresca*, 380 U.S. 102, 110; *Ker* v. *California*, 374 U.S. 23; *Smith* v. *United States*, 358 F.2d 833, 836, 838 (C.A. D.C.); *United States* v. *Pitt*, 382 F.2d 322 (C.A. 4). However, it is not necessary to reach this question, as the brief detention here by the two MP's for reasonable questioning, followed by the request that he stand aside until there had been communication with headquarters' did not constitute an arrest. *Terry* v. *Ohio*, 392 U.S. 1; *Rios* v. *United States*, 364 U.S. 253, 262; *Gilbert* v. *United States*, 366 F.2d 923, 928 (C.A. 9). The arrest can reasonably be said to have occurred when the two agents arrived and requested that petitioner accompany them to security headquarters. It is not contested that at that time ample grounds for arrest existed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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BEATRICE ROSENBERG,
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FEBRUARY 1969.

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